EDITOR'S NOTE

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91-1115 (3)

Supreme Court, U.S.
FILED
JAN 2 1992
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

VILLY DIERNISSE - PETITIONER

VS.

BUSINESS COMMUNICATIONS COMPANY, INC.

and LOUIS NATURMAN RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI
APPENDICES No. 2

VILLY DIERNISSE, PRO SE

9 KAUFMAN DR.

WESTWOOD NJ 07675

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APPENDIX H

U.S. District Court, District of Connecticut

Proposed Ruling on Motion for Preliminary Injunction

No. Civil B-84-44 (EBB)

Proposed and filed September 3, 1985

Adopted and Ordered September 24, 1985, filed September 25, 1985

Proposed Ruling on Motion for Preliminary Injunction

Under Rule 65, F.R.Civ.P., plaintiff Diernisse, a professional writer, has moved for a preliminary injunction restraining defendant from distributing, publishing, or selling copies of two books or from doing any act inconsistent with plaintiff's claimed ownership of copyrights of these works. Injunctions in copyright infringement actions are authorized by the Copyright Act of 1976, 17 U.S.C. § 101 et seq. An evidentiary

hearing was held before the magistrate on August 8, 1985.

The parties have stipulated on the record that there is one controlling factual issue in this matter: whether there was such an exercise of supervision and control by the defendant that plaintiff is not an independent contractor. If there was such an exercise of supervision over the writing of the works in question, the injunction cannot issue. However, if the amount of control exercised was such that plaintiff was a truly independent contractor, the injuntion shall issue. For the reasons discussed below, the court finds that plaintiff Diernisse's relationship to the defendant was that of an independent contractor, that defendant did not significantly direct or supervise Diernisse's creation of the works in question, and that Diernisse--not BCC or its employees Natureman

and Bakker--is the author and artistic creator of the subject works. Accordingly, plaintiff's application should be granted.

I

Since about 1975 Villy Diernisse has made his living as a full time writer, self-publisher, and consultant. he has a degree in mechanicai engineering and writes articles on plastics, packaging, and other technical subjects; he often works on several articles simultaneously. At the injunction hearing, he testified that he works in his home in Westwood, New Jersey, where he maintains a fully equipped business office containing a library, typewriter and photocopier. He is a dues-paying member of several professional writer's organizations and subscribes to some two dozen technical periodicals, he maintains a separte business bank account for the proceeds

from his writing.

In June, 1979, plaintiff responded to an advertisement placed by defendant Business Communications Company ("BCC") of Stamford, Connecticut. The advertisement read as follows: "HELP WANTED!!! platics persons with organizational/ writing talent to research and author industry studies." Respondents were to contact Marilyn Bakker or Lou Naturman. plaintiff´s written response indicated that he possessed 25 years of experience in "all aspects of the plastics industry" and directed defendant´s attention to his most recent published article. plaintiff also stated in his letter that he had a library of published material dating from 1954 and that he did his own typing and submitted professional manuscripts. Diernisse met with Naturman, the president of BCC, and Bakker at defendant´s office in Stamford. At that meeting, it

was agreed that plaintiff would write the book Platics Forming.

It is undisputed that plaintiff was to be paid twice the purchase price of the book ($1500), his expenses, and a royalty on copies sold. Apparently there was no written contract. It is also undisputed that plaintiff had no prescribed working hours and that he was expected to work out of his home in New Jersey, although Naturman testified that there was space available in Stamford for plaintiff's work. No deductions were made by defendant for FICA or withholding taxes and plaintiff received no employee benefits from defendant. There is no dispute that plainfiff and Bakker, his editor, met infrequently and maintained telephone contact no more that 2 or 3 times per month.

The work itself was done in two or three stages, plaintiff sometimes sub-

mitting as much as 50 to 100 pages at a time. A second book, Food Packaging, was written under similar conditions. Plaintiff's name appears on the front cover of each work; Marilyn Bakker's name does not appear. On the cover of a sequel to Plastics Forming, Plastics Forming Dynamics and Trends ("Forming II"), the work plainfiff alleges is derived from his own, Dawood Ghavnave is designated as "project supervisor".

It is the nature of Bakker's involvement in plaintiff's work that the parties dispute. Diernisse credibly characterizes Bakker's work as that of a "very good editor": she did revisions, asked questions and made suggestions to improve the work. However she did not, plaintiff credibly asserts, instruct him as to scope or content of the books; the words and expression used were his own. According to plaintiff, only after all of

the books installments were received did Bakker critique plaintiff´s work.

In contrast, Bakker describes her involvement with plaintiff´s work as "constant supervision." She considered herself to be plaintiff´s project supervisor rather than merely his editor. Bakker herself has an undergraduate degree in bacteriology and a Master´s Degree in education. prior to her employment with the defendant, she was a freelance writer. Bakker testified that she received her training in plastics technology from Naturman, whose employ she left in 1981. Bakker asserts that she "constantly " passed judgment on points made by the plaintiff and that Naturman sometimes had to be called in to "mediate". She testified to having had many disagreements with the plaintiff on methodology. Nevertheless, Bakker agreed that her telephonic contact with plain-

tiff was no more than twice a month; she stated she could not recall how often they had met in person. The completed work, she maintains, follows the general formal characteristic of defendant's publications.

Similarly, Louis Naturman testified that all of this company's technical studies follow the same general format. However, he testified that these works may be written either by staff writers or by contractors. He noted that the plaintiff make the day-to-day decisions about the ongoing work and that it was submitted in stages. Naturman expected that the plaintiff would do the work in his home. Some changes, he indicated were made in the books as a result of discussions with plaintiff. Naturman testified that there was "no difference" between a project supervisor and an editor. Nevertheless, Naturman stated that Bakker was

not the project supervisor on plaintiff's books; the "person who does most of the writing" is the one whose name appears on the cover. He stated that plaintiff was given the ground rules regarding the boo's form but not the specifics. Nevertheless, Naturman testified that Bakker had "supervised" the plaintiff's writing of both books.

II

As the parties agree, the pivotal issue here is whether or not plaintiff should be characterized as an independent contractor. His characterization is important since it determines in the circumstances of this case whether there has been a triggering of the "work for hire" doctrine under copyright law. According to this doctrine, an employer for whom work is done owns the copyright if certain conditions are met. Critical to this detemination is whether an ex-

press contract exists making the work one "for Hire", especially one restricting the author's freedom to engage in other writing activities for hire, whether regular working hours were maintained and whether the creative work occurred at the employer's place of business. Quinto v. Legal Times of Washington, Inc. 506 F. Supp. 554, 558 (D.D.C. 1981).

Work subject to this analysis include:

> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test or as an atlas.... 17 U.S.C. PQ 101(2).

Given the seeming inapplicability of these criteria to the plaintiff's situation, i.e., the absence of a written agreement and the nature of the books produced, the work for hire doctrine would appear inapposite but for a recent decision in this circuit, Aldon Accessories, Ltd. v. Spiegel,

Inc., 738 F.2d 548 (2d Cir. 1984).

In Aldon, the Second Circuit found that statuettes commissioned by Aldon were works made for hire despite the absence of a written instrument and the nonpresence of the subject work among the enumerated categories appearing under § 101(2) of the Copyright Act. Accordingly then, as the parties have stipulated, the key issue is a determination of plaintiff's status as a truly independent contractor vel non. This status will determine the applicability of work for hire analysis as interpreted in the Aldon decision and affect the likelihood of plaintiff's success on the merits.

It is well established that an independent contractor is one who contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of the work. Darling v.

Burrone Bros., Inc.. 162 Conn. 187, 195 (1972). Accordingly, a critical factor in deciding whether an employee relationship exists is whether there has been an exercise of a right to control and supervise the manner in which the work is performed. Epoch Producing Corp. v. Killiam Shows, Inc., 552 F.2d 737, 734 (2d Cir. 1975), Cert. denied, 424 U.S. 955 (1976), cited in Aitken, Hazen, Hoffman, Etc. v. Empire Construction Co., 542 F. Supp. 252, 257 (D. Neb. 1982). Although the manner of payment is not decisive in determining independent contractor status, it is an important factor. Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640, 651 (S.D.N.Y. 1970).

In cases involving writers, the author's freedom to engage in outside writing activities from which he derives substantial independent income has been

held indicative of an absence of an employment for hire. See, e.g., Picture Music, Inc. v. Bourne, Inc., supra, 314 F. Supp. at 651, For example, in F.A.S. International, Inc. v. Reilly, 179 Conn. 507 (1980), a case under the Connecticut unemploument compensation statute, the Connecticut Supreme Court upheld a lower court decision that a number of part-time artists, writers and photographers were not employees. These individuals considered themselves to be independent contractors: they worked no regular hours, received no fringe benefits and had no Social Security or other taxes withheld from their paychecks. They performed their work in their homes and provided their own office space, equipment and supplies; they performed on or two assignments at a time and returned the work when completed. Moreover, they performed freelance work for other employers as

well. Id. at 509, 510.

III

Although the nature of the work performed by plaintiff in the present case differs somewhat from that of the writers in F.A.S. International, similarities in the manner of the work's performance and method of payment are significant. Also of some significance is the fact that Diernisse was clearly not considered an employee for tax and benefits purposes. It is undisputed that plaintiff performed the work in his home and was expected to do so. He used his own supplies and library of published material. He was not on the defendant's regular payroll but was to be paid on the basis of the completed work; twice thge purchase price plus royalties. Even the advertisement he answered southt persons to "author" industry studies.

Significantly, even though Marilyn

Bakker considered herself to be the "project supervisor" of the two works authored by the plaintiff, she is not so designated on the covers of plaintiff´s books, despite Naturman"s testimony that this was the usual practice of his company. Indeed, Naturman´s statements in this regard are somewhat contradictory; although he asserted that Bakker "supervised" plaintiff´s work, he indicated that Bakker was not the project supervisor. Moreover, such "supervision" admittedly did not take place on a day-to-day basis; plaintiff was responsible for the specifics of the work. Naturman´s statement that BCC publishes its studies through the use of either staff writers and contractors also is of some significance; if indeed, as defendant argues, plaintiff was not such a contractor why did defendant advertise for "authors" and designated plaintiff as such on the

covers of his books? From this combination of circumstances, the court is led to conclude that plaintiff was indeed a truly independent contractor.

The magistrate does not find Bakker´s conclusory statements with regard to her " supervisory" role persuasive. Although from her testimony on her bakground in working with technical subjects Bakker is clearly qualified to perform critical and rigorous editing, her testimony as to the type of "supervision" she rendered is not inconsistent with the role of a good editor. Were her suggestions for improvement to plaintiff´s work limited to grammatical construction and punctuation she might be considered a mere proofreader, not an editor. While the court does not profess extensive knowledge of the field of technical writing, it is logical to assume that editors in these areas possess specialized knowledge adequate to

permit them to render meaningful criticism. Indeed, as Bakker herself testified, she had asked Naturman to assign her to projects involving plastics so that she could become more specialized. Moreover, the fact that telephonic contact with plaintiff occurred only 2 or 3 times per month is inconsistent with Bakker's conclusory testimony regarding "constant supervision".

Seemingly, if Bakker's contacts with plaintiff were as significant and as fraught with dispute as Bakker asserts, the number of such contacts might be clearer in her mind, despite the passage of time. While the court does not doubt that Bakker believes herself to have exercised a substantial supervisory role in the completion of these books, it does not find Bakker's conclusions compelling or creditable in light of the other undisputed circumstances surrounding

plaintiff;s contractual arrangement with defendant.

IV

Given that the court concludes that Diernisse was an independent contractor, it remains to consider whether the recent interpretation of the work for hire doctrine presented in Aldon so affects the likelihood of the plaintiff´s sucess on the merits as to preclude the issuance of a preliminary injunction. It does not. The court finds that the facts in Aldon are distinguisable from those in the instant case.

Aldon did not involve a writer but artisans who were commisioned to make porcelain statuettes to be marketed by Aldon Accessories. Although the statues were to be designed by artists who were not regular employees of the accessories firm, the degree of supervision exercised by one of the firm´s principals differs

dramatically from that in the instant case. In Aldon, the principal supervised the project on a daily basis: models were prepared directly in front of him for hours at a time. As the Second Circuit observed, he "stood over the artists at critical stages of the process, telling them exactly what to do. He was in a very real sense, the artistic creator." Aldon v. Spiegel, supra, 738 F.2d at 550, 553.

This kind and quality of supervision is not fairly comparable to the degree of "control" purportedly exercised by Marilyn Bakker in her editing of plaintiff's work. Accordingly, Aldon does not preclude the issuance of a preliminary injunction.

V

The movant's burden in seeking a preliminary injuntion is well established. A dual showing must be made: 1)

the likelihood of success on the merits, and 2) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardship tipping decidedly in his favor. Coca-Cola Company v. Tropicana Products, Inc., 690 F.2d 312, 314-315 (2d Cir. 1982. Moreover, the plaintiff must show also that he is likely to suffer irreparable injury if the requested release is granted. Arrow United Industries v. Richards, 678 F.2d 410, 413-14 (2d Cir. 1982). A copyright holder may be presumed to suffer irreparable harm when the right to the exclusive use of the copyrighted material is invaded. Robert Stigwood Group v. Sperber, 457 F.2d 50, 55 (2d Cir. 1972).

In the instant case, the parties have stiplated that a finding that plaintiff was acting as a genuinely independent contractor should result in the issuance

of a preliminary injunction. Therefore, it is unnecessary for the court to undertake a detailed discussion of the standard for injunctive relief. Suffice it to say that the plaintiff, as the copyright holder of these works, may be deemed to suffer irreparable injury if these works or those allegedly derived from them continue to be distributed by defendant. Plaintiff has submitted materials which indicate a sufficiently close relationship between the works Plastics Forming and Forming II to demonstrate the likelihood of his success on the merits of this copyright infringement action. As between the parties, the balance of hardship tips decidedly in plaintiff's direction.

For all of the above reasons and for those appearing in plaintiff's meticulous memoranda, a preliminary injunction should issue restraining the defendant,

its agents, servants and employees and all persons acting in concert with them from distributin, publishing and selling copies of the books Plastics Forming and Plastics in Food Packaging or any works derived therefrom. In addition, defendant should be restrained from holding itself out as the copyright owner of those works and from doing any act inconsistent with the plaintiff's ownership of these copyrights.

The parties are free to seek timely review by the district judge pursuant to 28 U.S.C. §636 and the Local Rules. The parties are further directed fortwith to submit a joint proposed injunction order for the district judge's consideration and signature.

Dated at Bridgeport, Connecticut, this 3rd day of September, 1985.

Signed Thomas P. Smith. United States Magistrate

APPENDIX I.pa

U.S. District Court, District of Connecticut

Order of Preliminary Injunction

No. Civil B-84-44 (EBB)

Ordered September 24, 1985, filed September 25, 1985

Order of Preliminary Injunction

The Court, having reviewed the Proposed Ruling on Motion for Preliminary Injunction by Magistrate Thomas P. Smith, and dated September, 1985, hereby enters this Preliminary Injuntion restraining the Defendant, Business Communications Co., its agents, servants, and employees, and all persons acting in concert with them, from:

1. Publishing, distributing, preparing, or selling any derivative works of either Plastics Forming P-049 or Plastics in Food Packaging P-034;

2. Holding itself out as the copyright

owner of the copyrights in and to Plastics Forming P-49, Plastics in Food Packaging P-034, and any derivative thereof, through the affixation of improper copyright notices, improper copyright registrations, or otherwise;

3. Doing any act inconsistent with the Plaintiff's ownership of the copyrights in and to Plastics Forming P-049 and Plastics in Food Packaging P-034.

Dated at New Haven, this 24th day of September, 1985.

Signed The Honorable Ellen Bree Burns, United States District Court Judge

APPENDIX J

U.S. District Court, District of Connecticut

Denial of Motion for Reconsideration of Ruling and Order Dated September 22, 1989

No. Civil B-84-44 (EBB)

Ordered and filed February 20, 1991

Motion for Reconsideration of Ruling and Order Dated September 22, 1989

Plaintiff respectfully requests that the Court reconsider and vacates its order of September 22, 1989.

Denied

Signed F. Owen Eagan, United States Magistrate Judge.

APPENDIX K

U.S. Court of Appeals for the Second Circuit

Denial of Petition for Review of Granting of Appellees' Motion for Dismissal

No. 91-7751

Ordered and filed October 3, 1991

Order

It is hereby ordered that the motion be and hereby is denied

APPENDIX L

U.S. District Court, District of Connecticut

Judgment

No. Civil B-84-44

Ordered and filed September 20, 1991

Judgment

This cause having come on for consideration before the Mediation Panel and a Decision having been filed on June 20, 1991, approved by the Honorable F. Owen Eagan, United States Magistrate Judge and so ordered on June 26, 1991, by the Honorable Ellen Bree Burns, Chief Judge, United States District Court,

It is Ordered, adjudged and Decreed, as follows:

(1) That judgment be and is herby entered in favor of the plaintiff to recover of the defendants Business Communications, Inc. and Louis Naturman damages in the amount of $6,138.10 and

interest in the amount of $5,313.90 for a total of $11,452.00;.

(2) That judgment be and is hereby entered in favor of the defendant Business Communications, Inc. and Louis Naturman damages in the amount of $6,935.26 and interest in the amount of $5,767.71 for a total of $12,702.97

(3) That the net due defendants Business Communications, Inc. and Louis Naturman is $1,259.97, and

(4) That summary judgment be and is hereby entered in favor of the defendant Elaine Naturman, as set forth in the court's Omnibus Ruling dated May 13, 1988.

Dated at New Haven, Connecticut, this 20th day of September, 1991.

Kevin F. Rowe, Clerk, United States District Court

by Signed (unreadable)

Deputy in Charge

APPENDIX M

U.S. District Court, District of Conmnecticut

Letter of January 19, 1990 from Diernisse to Magistrate Owen Eagan.

No. Civil B-84-44 (EBB)

January 19, 1990

Villy Diernisse

9 Kaufman Drive Westwood NJ 07675

(201) 664-6222

January 19, 1990

Honorable Owen Eagan

U.S. District Court

450 Main St.

Hartford CT 06103

Dear Magistrate Eagan:

In the matter of Villy Diernisse v. Business Communications Co., et al; Civil B-84-44 (EBB). I consent to binding tripartite commercial arbitration, as discussed at the settlement conference before you on December 18, subject to the

conditions stated by you at that meeting.

1. That no testimony of witnesses will be taken.

2. That any past settlement negotiations not be introduced.

3. That both parties be permitted to pass on the competence of the other Party's nominee to the panel.

4. That Defendants comply with all the outstanding items of the pretrial order due October 16, 1989.

5. That Defendants furnish copies of the evidence in their possession as listed in item No. 11 of Plaintiff's Trial Memoranda of September 18, 1989.

I also request that the judicial officer appointed to the panel be someone else besides you or Judge Burns because both of you have participated in past settlement negotiations.

My nominee to the panel is Lewis Kurlantzick, Professor of Law at Univer-

sity of Connecticut Law School. Enclosed is a three page copy of his Curriculum Vitae.

Sincerely,

Signed

Villy Diernisse

cc

Clerk of the Court/New Haven

Clerk of the Court/Hartford

Messrs. Stanley Yavner, Lawrence Nadel, and Richard Feldman.

APPENDIX N

U.S. District Court, District of Connecticut

Letter of January 30, 1990 from Yavner to Magistrate Eagan

No. Civil B-84-44 (EBB)

January 30, 1990

January 30, 1990

Hon. U.S. Magistrate Owen Eagan

U:S. District Court

District of Connecticut

450 Main Street

Hartford, Ct. 06103

Re: Diernisse v. BCC et al

Civil Action No. B-84-44 (EBB)

Dear Magistrate Eagan:

Further to my phone message to your secretary about ten days ago and responsive to Mr. Diernisse's letter of January 19th please be advised that I consent to binding arbitration, on the issues of both liability and damages, as

discussed at the settlement conference with you on December 18th. I prefer to communicate my consent without conditions, but I feel compelled to respond to Mr. Diernisse's conditions, as well as to set forth a request for explanation. More specifically, I agree to Mr. Diernisse's conditions 1. and 3.

As to Mr. Diernisse's conditions 4. and 5., they should, of course, be reciprocally applied. Lastly, as to Mr. Diernisse's condition number 2., I trust that we will be guided by the Federal Rules of Civil Procedure.

As to Mr. Diernisse's request, I have no objection to the elimination of you from consideration for the panel, because your mission was specifically for purposes of a settlement conference; however, I do not agree to the elimination of Judge Burns, since in settlement talks before her (only on a single occasion by

means of a brief mention of settlement), the settlement discussions were incidental.

I would also request an explanation from Mr. Diernisse; namely, an indication of what was told to his selected arbitrator, at the time he was interviewed by Mr. Diernisse. This request for explanation is, of course, in order to determine the ground rules for approaching a potential arbitrator. Usually, the way this would be done would involve only a one sentence explanation of the substance of the matter, and no communication that could be considereded an argument for one side or the other. Also I would ask that an explanaation be given by Mr. Diernisse as to how payment was promised to his selected arbitrator.

I also question whether or not in determining competence under Mr. Diermisse's condition number 3., the other

side would be able to interview the selected arbitrator. All of this would indicate to me how I should approach my perspective nominee for the arbitration panel, whom I have not approached as of this time.

Respectfully submitted,

/S/

Stanley J. Yavner,

Attorney for Defendants

SJY:mt

cc: Richard Feldman, Esq.

Lawrence P. Nadel Esq.

APPENDIX O

U.S. District Court, District of Connecticut

Answer to Substituted Complaint

No. Civil B-84-44 (EBB)

Submitted May 20, 1988, filed May 25, 1988

Note: The first four pages of the Answer to Substituted Complaint are not being reproduced here because they are not relevant to the petition for the writ.

Affirmative Defenses

1. Plaintiff has failed to set forth any claim upon which relief may be granted.

2. Plaintiff, as an employee for hire under the Copyright Law of the United States, is without copyright rights in and to the works at issue herein.

3. Plaintiff is barred by the Statute of Frauds from enforcing any alleged

contractual agreement with defendants.

4. Plaintiff is barred from claiming copyright ownership in the works, or denying defendant BCC's ownership, by virtue of estoppel and/or laches.

5. Plaintiff's claims for relief predicated on the Copyright Law are barred by 17 U.S.C. §507(b).

6. Plaintiff's claims for relief predicated on the Connecticut Unfair Trade Practices Act are barred by Section 42-110g(f) of the Connecticut General Statutes.

7. Defendants hereby incorporate by reference all affirmative defenses set forth in defendant Business Communications Co., Inc.'s Answer, Affirmative Defenses and Counterclaims of or about February 13, 1984.

Wherefor, defendants demand that plaintiff's claims be dismissed with prejudice; that defendant BCC's counter-

claim be granted, and that defendants be awarded their costs and reasonable attorneys' fees, as well as such other relief as may appear just and proper.

Wolder, Gross & Yavner
Attorney for Defendants
41 East 42nd Street
New York, NY 10017
(212)687-3233
By
Jay A. Bondell, Esq.
Of Counsel:
Richard D. Feldman, Esq.
Evans, Feldman & Boyer
261 Bradley Street
Box 1694
New Haven, CT 06507
(203) 772-4900

APPENDIX P

U.S.District Court, District of Connecticut

Letter of November 26, 1980 from Diernisse to Naturman

No. Civil B-84-44 (EBB)

November 26, 1980

November 26, 1980

Mr. Lou Naturman

Business Communications Co.

Box 2070 C

Stamford CT 06906

Dear Lou,

I am writing to suggest that we approach our differences as a matter of business, and do not get involved in personalities. Remember what you said the last time the issue of money came up? "Let´s part friends."

Since we have already agreed that Business Communications is not going to publish the book on the retort pouch, we

may have some claims against each other; but there should not be any reasons why we cannot settle those amicably.

The retort pouch has nothing to do with our past dealings, and I am a little surprised at your threats of legal action, withholding of royalties, etc. However, I am willing to let that pass as something you just said on the spur of a monents anger. I am not scared of those threats, but do not believe that any legal action on either party´s part is warranted if we both handle this in a sensible manner, and I am more than willing do do my part.

Perhaps you can think this matter over, reach some conclusion as what you think is fair, and give me a call.

Sincerely,

Signed

Villy Diernisse

APPENDIX Q

U.S.District Court, District of Connecticut

Answer, Affirmative Defenses and Counterclaims

No. Civil B-84-44 (EBB)

Dated February 13, 1984, filed February 14, 1984

Note: The answers to plaintiif´s claims have not been reproduced here because they are not pertinent to the petition for the writ.

First Affirmative Defense

1. Each count of the complaint fails to state a claim upon which relief may be granted.

Second Affirmative Defense

1. The claims for relief set forth in Count I and in Count III are barred by 17 U.S.C. § 507(b) in that this action was not commenced within three years of the time that the claim, if any, of the

plaintiff against the defendant accrued.

Third Affirmative Defense

1. The claims for relief set forth in Count VI are barred by § 42-110 g(f) of the Connecticut General Statutes in that this action was not commenced within three yearts of the acts alleged to be violations of the Connecticut Unfair Trade Practices Act.

Fourth Affirmative Defense

1. At all times mentioned in the complaint, the plaintiff was the employee of the defendant, or was otherwise engaged in the preparation of a work for hire for the defendant, as provided in 17 U.S.C. § 101.

2. By reason of the above, the defendant is the owner of the copyright to the works referred to in the complaint under 17 U.S.C. § 201(b).

Fifth Affirmative Defense

1. On or about February 11, 1980, the

defendant registered its copyright in "Plastic Forming - P-049" with the Register of Copyrights of the United States of America, registration number TX 458-759.

2. The plaintiff, at all times mentioned in the complaint, had actual knowledge of such registration.

3. The defendant from February 1980 to the present, has published "Plastics Forming- P-49" with statutory copyright notice showing that it is the owner of the copyright in such work.

4. The plaintiff, at all times mentioned in the complaint, had actual knowledge of such claim of copyright.

5. The plaintiff, at all times mentioned in the complaint, has knowingly accepted payments from the defendant on account of such work, and has not, until the present controversy, claimed any ownership interest in such copyright to such work.

6. By reason of the above, the plaintiff has waived any right to claim copyright in such work, and has estopped himself by his conduct from presenting such claim.

Sixth Affirmative Defense

1. On or about August 19, 1980, the defendant registered its copyright in "Plastics in Food Packaging (P-034R)" with the Register of Copyrights of the United States of America, registration number TX 531-972.

2. The plaintiff, at all times mentioned in the complaint, had actual knowledge of such registration.

3. The defendant, from August 1980 to the present, has published "Plastics in Food Packaging (P-034R)" with statutory copyright notice showing that it is the owner of the copyright in such work.

4. The plaintiff, at all times mentioned in the complaint, had actual

knowledge of such claim of copyright.

5. The plaintiff, at all times mentioned in the complaint, has knowingly accepted payments from the defendant on account of such work, and has not, until the present controversy, claimed any ownership interest in such copyright to such work.

6. By reason of the above, the plaintiff has waived any right to claim copyright in such work, and has estopped himself by his conduct from presenting such claim.

Seventh Affirmative Defense

1. On or about February 11, 1980, the defendant registered its copyright in "Plastic Forming - P-049" with the Register of Copyrights of the United States of America, registration number TX 458-759.

2. The plaintiff, at all times mentioned in the complaint, had actual knowledge of such registration.

3. The defendant from February 1980 to the present, has published "Plastics Forming- P-49" with statutory copyright notice showing that it is the owner of the copyright in such work.

4. The plaintiff, at all times mentioned in the complaint, had actual knowledge of such claim of copyright.

5. The plaintiff, at all times mentioned in the complaint, has knowingly accepted payments from the defendant on account of such work, and has not, until the present controversy, claimed any ownership interest in such copyright to such work.

6. The defendant during such time has invested substantial amounts of time and money in promoting such work, and the plaintiff, at all times mentioned in the complaint, has had actual knowledge of the same.

7. By reason of the above, the plain-

tiff has intentionally and unexusably delayed presenting his claim to the prejudice of the defendant, and therfore his claim is barred by laches.

Eighth Affirmative Defense

1. On or about August 19, 1980, the defendant registered its copyright in "Plastics in Food Packaging (P-034R)" with the Register of Copyrights of the United States of America, registration number TX 531-972.

2. The plaintiff, at all times mentioned in the complaint, had actual knowledge of such registration.

3. The defendant, from August 1980 to the present, has published "Plastics in Food Packaging (P-034R)" with statutory copyright notice showing that it is the owner of the copyright in such work.

4. The plaintiff, at all times mentioned in the complaint, had actual knowledge of such claim of copyright.

5. The plaintiff, at all times mentioned in the complaint, has knowingly accepted payments from the defendant on account of such work, and has not, until the present controversy, claimed any ownership interest in such copyright to such work.

6. The defendant during such time has invested substantial amounts of time and money in promoting such work, and the plaintiff, at all times mentioned in the complaint, has had actual knowledge of the same.

7. By reason of the above, the plaintiff has intentionally and unexusably delayed presenting his claim to the prejudice of the defendant, and therfore his claim is barred by laches.

Ninth Affirmative Defense

1. For the reasons set forth above, the plaintiff is guilty of having unclean hands with respect to the matters alleged

in his complaint.

2. For that reason, the court should not grant any equitable relief to the plaintiff.

Counterclaim

First Count:

1. At all times mentioned in the complaint, the plaintiff was the employee of the defendant, or was otherwise engaged in the preparation of a work for hire for the defendant, as provided in 17 U.S.C. § 101.

2. By reason of the above, the defendant is the owner of the copyright to the works referred to in the complaint under 17 U.S.C. § 201(b).

3 On or about February 11, 1980, the defendant registered its copyright in "Plastics Forming - P-049" with the Register of Copyrights of the United States of America, registration number TX 458-759.

4. On or about August 19, 1980, the defendant registered its copyright in "Plastics in Food Packaging (P034R)" with the Register of Copyrights of the United States of America, registration number TX 531-972.

5. The plaintiff has claimed to be the owner of the copyright to such works, and has, upon information and belief, registered its claim to copyright therein with the Register of Copyrights of the United States of America.

6. The action of the plaintiff in so registering its claim to copyright was taken with actual knowledge of the rights of the defendant as set forth above, and with the actual intent to cause financial injury to the defendant.

7. The defendant is entitled to a declaratory judgment that it is the sole owner of such copyrights, that the registration of the plaintiff is improper, and

to its damages incurred as a result of the above.

Second Count:

1. In 1980 the plaintiff agreed with the defendant to produce a work to be known as "The Retortable Pouch: What´s Happening?".

2. The defendant paid the plaintiff´s out-of-pocket expenses for such work, and the plaintiff accepted such payment.

3. The plaintiff breached its agreement with the defendant by not producing such work within the time agreed.

4. As a result of the breach by the the plaintiff, the defendant incurred promotion costs which could not be recouped by sales of the work, and was damaged in its reputation by reason of its failure to publish such work as promised.

WHEREFORE, the defendant claims judgment:

1. Dismissing the complaint, with costs;

2. Declaring that the defendat is the owner of the copyrights in question;

3. Awarding compensatory damages of $50,000.00 to the defendant;

4. Awarding punitivve damages of $250,000.00 to the defendant;

5. awarding reasonable attorney,s fees under 17 U.S.C. § 505 to the defendant;

6 Awarding the costs of this action to the defendant; and

6. (sic) Granting the defendant such other and further relief, in law and at equity, as to the Court may appear just and proper.

Dated at Stamford, Connecticut, this 13th day of February, 1984

John J. Graubard

Graubard and Graubard

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APPENDIX R

U.S. District Cout, District of Connecticut

Memorandum of Law of Defendants for Mediation Panel

No. Civil B-84-44 (EBB)

Submittted April 2, 1991

Note: Only the front matter has been reproduced here as it shows the pertinency to the petition for the writ and summarizes Appelees arguments. Also the page numbers have not been reproduced because they are not pertinent to the petition for the writ.

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Statutes and Authorities

I. BACKGROUND AND FACTS

II ARGUMENT

A. Even In The Test To Determine "Work for Hire", Pronounced by the Supreme Court in the Reid Case in 1989, BCC and Diernisse Had a Rela-

tionship Whereby BCC Became the Owner of Rights to the Work

B. Alternatively, If a "Work for Hire" Is Not Found, BCC and Diernisse Should Be Considered Joint Authors of the Subject Matter of this Action

C. Plaintiff Is Not Entitled to Statutory Damages and Attorney Fees, Because Copyright Was Not Registered by Plaintiff Within Three Months of the Publication Date of the Work Registered

D. Plaintiff Committed Fraud in Obtaining His Copyright Registrations (Exhibits J-1 and J-2) For Failure to Disclose BCC's Previous Registration in part 5 of the Application for Registration, and For Attempting to Extend His Copyright Term By Stating a False Publication Date Eight Months Earlier Than Publication Occurred

E. Plaintiff's Registration Certificates TX 1-279-830 and TX 1-279-831 Are Defective, in that the Publications Covered By Those Certificates Included Defective Copyright Notices, As Not Including the Name of the Alleged Copyright Owner, Mr. Diernisse

F. P-49 and P-034R Did Not Contain Subject Matter of Sufficient Originality to Warrant Copyright Protection; and the Allegedly Derivative Works of BCC, Which Followed P-49 and P-034R Were In Fact Based More Upon Its Undisputed Publication P-033R, Issued in 1978 (Exhibit A)

G. The Mediators Should Award Damages Only on the Counterclaim; But if damages Are Deemed Owing to Plaintiff, They Should Be Limited By the Percentage Payment Originally Agreed to, and Not Yet Paid, and with a Subtraction of the $1,200 "Settlement" Evidenced by Pages 22-23 of the 1984 Deposition of Plaintiff (Exhibit G-1)

III. CONCLUSIONS

Note: The Index of Cases appeared on page No. i.

INDEX OF CASES

Bessett, Inc. v. Germain, et al, 18 F. Supp. 249 (D.C. Ma. 1937)

Business Trends Analysts v. Fredonia Group, Inc., 700 F. Supp. 1213 (S.D.N.Y. 1988)

Community for Creative Non-Violence v. Reid, 57 U.S.L.W. 4607 (U.S. Supreme Court, June 5, 1989

Donna v. Dodd, Mead & Co., 374 F. Supp. 429 (S.D.N.Y. 1974)

Florabelle Flowers, Inc. v. Markovits, Inc., 296 F. Supp. 304 (S.D.N.Y. 1968)

Klasmer v. Baltimore Football, Inc., 200 F. Supp. 255 (D.C. Md. 1961)

National Comics Publications Inc. v. Fawcett Pub. Inc., 191 F.2d 594 (2d Cir. 1951)

Picture Music, Inc. v. Bourne, Inc. 314 F. Supp. 640 (S.D.N.Y. 1970) affirmed on other grounds, 457 F.2d 1213 (2d Cir. 1971) cert. den'd 409 U.S. 997 (Sup. Ct. 1972)

Rural Telephone Service Company v. Feist Publications Inc. Decision issued March 27, 1991 (U.S. Sup. Ct.)

Sweet Music, Inc. v. Melrose Music Corp., 189 F. Supp. 655 (S.D. Ca., Central Division 1960)

Note: Statutes and Authorities appeared on page No. ii.

STATUTES

U.S. Code, Title 17, Section 19
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U.S. Code, Title 17, Section 201(a)
U.S. Code, Title 17, Section 412(2)
U.S. Code, Title 17, Section 504

AUTHORITIES

Nimmer on Copyright, Section 6.03 (1989)

APPENDIX S

U.S. District Court, District of Connecticut

Deposition of Louis Naturman

No. Civil B-84-44 (EBB)

Depostion taken on October 11, 1984 and February 25, 1985

Page 21

Q Which, I am sure are important. Did you get any feedback from any of the purchasers on either of these books?

A Yes.

Q What was the feedback, generally -- good, bad, or indifferent?

Page 22

A Unfortunately, some of the feedback that we got for one of them was questioning some of the data that were in the report.

Q Which book was being questioned, do you recall?

A I don't recall, I think it was the

Food Packaging.

Page 58

Q When Mr. Diernisse was first contacted or when he first contacted BCC and the first arrangement was struck, was the BCC's intention that Mr. Diernisse would be recognized as the author of the book?

A Of course,

Q And he is mentioned as the author in FORMING I?

A Here it is, right on the front page (indicating).

Q So the answer is yes?

A The answer is yes.

Q And the same thing is true of FOOD PACKAGING I, he is also mentioned as the author in FOOD PACKAGING I?

A Yes.

Page 63

Q One of Miss Bakker's jobs, if I recall, was to supervise a number of authors who may have been writing books

for the company, is that correct?

A Yes.

Q And she was a project supervisor, is that a fair characterization of her duties?

A I guess so, yes.

Q How many other authors did she supervise at any particular time?

A At any particular time she probably was not involved with more than one or two at the most.

Q Was she also discharging other duties on the company's behalf at the time she was involved with other authors?

A She was -- most of the work she did she worked on reports.

Q She wrote reports?

A Yes.

Page 64

****

Q Did you ever have any discussions with Miss Bakker particularly about Mr.

Diernisse as far as what she was to supervise with respect to Mr. Diernisse's writing Food Packaging I and Forming I?

A I'm trying to recall the exact nature of any discussion. Most of the time the material was sent to her and worked through her. I'm trying to remember actually our discussion, saying, "what are you going to do?" or "Marilyn, what are you not going to do?" But the fact that she handled most of the work with Villy, when he came up he talked to her more than to me about the progress of the reports. So I can't remember an exact division of duties as precisely stated at that time.

Page 65

Q So you don't know the exact division of duties between Miss Bakker and Mr. Diernisse with respect to Food Packaging I or Forming I?

A I don't remember if I sat down and

precisely divided the duties and supervision between Marilyn and myself. But the exact nature of -- a division of labor as it were -- between Marilyn and Villy was that Marilyn served as the editor, I guess, and she had to supervise the content of the reports.

Q Do you know specifically what duties she discharged with Mr. Diernisse in her capacity as editor?

A She went over the copy. She critiqued it. She asked questions. She made suggestions. She sent him material that may have had a bearing on what he did. She did anything that a good editor would do.

Q. And that was basically what she was to do with Mr. Diernisse?

A Yes.

Q Did she have any other responsibilities that you can think of?

A Not right now.

Q Does the company have a standard first sheet for all of its projet reports and books?

A What do you mean by first sheet?

Q The sheets which indicate the title of the book and would seem to have a photocopy of BCC´s logo and the name of the author or some other person at the bottom.

A It is more or less standard. it varies sometimes from title to title but by and large it is what you see is it most of the time.

Q Is it the company´s policy to put the name of the author or the project supervisor at the bottom of that Page?

A Yes

Q Do you know whether Miss Bakker´s name appears at all in Forming I?

A I don´t remember it. If this is a sample, this is the sample but I am not

sure. I am not sure that it does.

Q Now, Forming II, has the name of Dawood Ghaznavi on the bottom. He is listed as the project supervisor. What were his duties as the project supervisor?

A He basically did most of the work, most of the research and all of the writing. And he did the report.

APPENDIX T

U.S.Supreme Court

Statutes and Constitution

No. ?

Date: Not applicable

Connecticut General Statutes .

§ 52.576(a) No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues, except as provided in subsection (b) of this section.

§ 52. 581(a) No action founded upon any express contract or agreement which is not reduced to writing , or of which some note or memorandun is not made in writing and signed by the party to be charged therewith or his agent, shall be brought but within three years after the right of action accrues.

Title 17 U.S.C. § 101

***

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

***

A "work made for hire" is-

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instument signed by them that the work shall be considered a work made for hire. For the purpose of

the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literay, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens ot the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.